APPENDIX A

SUPREME COURT OF MONROE COUNTY
MEMORANDUM DECISION

(SAME TITLE)

Appearances:

Thomas G. Presutti, Esq., Attorney for the Plaintiff.

Rosario J. Guglielmino, Esq., Attorney for Defendant Police Advisory Board.

John Garrity, Esq., Attorney for the City of Rochester; June Weisberger, of Counsel.

Leo Kesselring, Esq., appearing amicus curiae for The Citizens for Abolition of the Police Advisory Board.

Benjamin Phelosof, Esq., appearing amicus curiae, Genesee Valley Chapter, American Civil Liberties Union.

MEMORANDUM DECISION

This is an action for a declaratory judgment with relation to the legality of the enactment by the Council of the City of Rochester (herein City) of an ordinance establishing a Police Advisory Board (herein Board).

The matter originally came before the court on a motion by the plaintiffs by order to show cause why the defendants should not be enjoined pending the determination of the issues in the action, from conducting hearings, investigations and other acts by the Board. The order to show cause also contained a temporary restraining order. Pending the argument of the motion it was agreed among counsel that the City would move for a summary judgment so that the court could pass upon the merits of the

action and, in the meantime, the temporary restraining order was vacated, except as to plaintiffs John Hunt, Nelson Evans and Joseph Favata, police officers against whom complaints are pending before the Board. The City has moved for summary judgment which is now before the court for decision.

There are two enactments by the City Council involved in this controversy. The creation of a Police Advisory Board (Amendment to Chapter 10 of Volume II of Municipal Code — Department of Public Safety — by adding § 10-10.1 through 10-10.25) under § 521 of Volume I of Municipal Code which authorizes the City Manager to appoint citizen advisory boards as may be authorized by the Council and the amendment of § 387 of Volume I of Municipal Code entitled: "Charges and trials of policemen and firemen."

When this proposed legislation was introduced in the Council the ordinance establishing the Police Advisory Board was apparently referred to the Law Committee and the amendment of §387 was sent to the Public Safety Committee. These committees filed a joint report recommending the adoption of both proposals.

The salient provisions of the ordinance establishing the Board are: (1) The appointment of a nine member board by the City Manager on which no active law enforcement officer may serve; (2) to hear complaints against any member of the Rochester Police Bureau which alleges the use of "excessive or unnecessary physical force against a person or persons", and to recommend such action as the Board thinks appropriate on each complaint; (3) the powers of the Board "are limited to those of an investigative and advisory nature, without any judicial or disciplinary powers"; (4) a copy of the complaint is sent to the Chief of Police who must report to the Board his

findings, recommendations and report of action taken, if any, together with all evidence on which they are based; (5) upon receipt of this report the Board then makes any independent investigation it considers necessary and must hold a private, closed hearing if the aggrieved person makes a written request for such a hearing; (6) the Board then proceeds to evaluate the Chief's report and if it agrees with him, it shall report this fact to the Commissioner of Public Safety, to the City Manager and it shall so advise the complainant and the Chief of Police, and it may make public its argeement with the Chief's findings, recommendations and actions; (7) if it disagrees with the Chief's decision after the evaluation of his report, it shall consult privately with him in an attempt to arrive at a "common conclusion", making available to him all information and evidence in the Board's possession; (8) the Chief shall then have the opportunity to conduct further investigations to properly evaluate any new information or evidence presented to him by the Board; (9) the Chief shall then report the result of his findings to the Board; and (10) if the Board and the Chief are unable to arrive at a "common conclusion", the Board shall report this disagreement along with its findings and all evidence and its recommendations to the Commissioner of Public Safety and the City Manager.

Except for the last section of the ordinance concerning the records and reports of the Board, the enactment concludes with this section:

> "§ 10-10.24—If within two weeks of the receipt of the report of disagreement from the Board to the Commissioner of Public Safety, and the City Manager, action which is satisfactory to the Board has

> not been taken by the City administration, the Board may make public its recommendation to the Commissioner of Public Safety and the City Manager. This act may be done at the public meeting of the Board."

The amendment to § 387 provides that a charge must be signed and verified and set forth the specific act or acts and such other information required by the rules of the Commissioner, and continues as follows:

> "After the filing of the charges, the Commissioner shall cause a preliminary investigation of the charges to be made, and if he finds that there is probable cause for such charges he may order a hearing on said charges. A copy of the charges must be given to the accused person. The hearing may be held by the Commissioner or by a person or persons designated by him who, in the opinion of the Commissioner, is qualified to hold hearings by virtue of his education, experience, or training. If the holding of the hearing has been delegated, the hearing officer or officers shall hear the charges in accordance with the rules of the Commissioner and shall report to the Commissioner for his review and decision."

Prior to the amendment the ordinance provided that the decision of the Commissioner was final and conclusive, but the amendment added the provision that it was "subject only to review by a court of competent jurisdiction."

It is the City's position that "the new ordinance establishing the Police Advisory Board was intended to supplement, complement and be consistent with the provisions of § 387".

The City in its oral argument and in its brief urges that the creation of the Board "was to establish a procedure whereby a distinguished body of citizens would aid the Commissioner of Public Safety in screening written, verified charges brought to the Board's attention, and provide the Commissioner of Public Safety evidence, findings and recommendations to help him determine whether the filed complaint forms a sufficient basis for a departmental disciplinary hearing as authorized by § 387".

This section provides that: "The hearing may be held by the Commissioner or by a person or persons designated by him * * *", but makes no provision for a designation of anyone to conduct the preliminary investigation for probable cause, the role assigned to the Board under the ordinance, according to the City. The fact is that the members of the Board are not the appointees of the Commissioner, as the ordinance establishing it specifically provides that its members are to be, and in fact were, appointed by the City Manager pursuant to § 521 of the Municipal Code. Under §387 the City Manager performs no function as the "decision of the Commissioner is final and conclusive", and by the 1963 amendment to this section, the Commissioner's decision is "subject only to review by a court of competent jurisdiction."

While the Board was created by the Council pursuant to § 521 of the Municipal Code and its members were appointed by the City Manager, there is nothing in § 387 to warrant his participation in a disciplinary proceeding against a police officer, either directly or by means of an agency or board appointed by him.

This section does not provide for the designation of a person or persons by the Commissioner to conduct the

preliminary investigation of the charges for probable cause as it does for the conduct of a hearing on charges after the finding of probable cause. Even if it should be implied that he has such a right, the ordinance has stripped him of this prerogative. Where a hearing by a designee is permitted the failure to obtain written authorization is jurisdictional and fatal to a proceeding. *Matter of Blount v. Forbes,* 250 App. Div. 15, 17. Without a finding of probable cause by the Comissioner there can be no hearing and upon principle it would seem that his participation in the initial step is vital.

It is understandable that the responsibility of making the preliminary investigation be given to the Commissioner who is experienced in police matters. He is in a better position to make a judgment as to what force was necessary under a given set of circumstances and whether the police officer was faced with a situation that gave no time for calm reflection but acted reasonably under the exigency that confronted him . This requires an independent appraisal on his part.

Section 387 is the City's grant of power to discipline a police officer even to the point of dismissing him from service. It is also the employee's right to have the full protection of this statutory provision.

Under the ordinance the public official who is the principal actor is the Chief of Police, who plays no part in the disciplinary proceeding under § 387, unless the Commissioner, in his discretion ,assigns some function to him.

The City furnished to the court, the rules and regulations of the Police Department concerning charges and trials, issued June 1, 1960. They are very meager, con-

sisting of one section of two brief paragraphs concerning charges, and another section consisting of four short paragraphs concerning trials. Nevertheless, they are not inconsistent with § 387, which generally follows § 75 of the Civil Service Law, except that they provide that the Commissioner shall preside at a trial, which is without legal effect by reason of the 1963 amendment.

Under the ordinance, the only role the Commissioner plays is that of being the recipient, together with the City Manager, of the Board's report that it agrees with the Chief's findings, recommendations and actions, or in the event the Board and the Chief of Police are unable to arrive at a common conclusion, the report of this disagreement. In the latter case, as pointed out, the City administration has a period of two weeks in which it may take action satisfactory to the Board, and in the event it fails to do so the Board may make public its recommendations to the Commissioner and City Manager.

If the Board was created for the purpose of assisting the Commissioner in making a determination whether a filed complaint forms a sufficient basis for a departmental disciplinary hearing as stated by the City, the query arises as to how he is assisted by arming the Board with the threat of public confrontation with the City administration when there is a disagreement between the Chief and the Board which is not adjusted to the Board's satisfaction.

The Board in its oral argument and brief maintains that "the ordinance is a constitutionally valid method of criticizing publicly the official conduct of policemen" and frankly states: "What is in issue is the right of the Board to criticize publicly the conduct of policemen." It says that it has no judicial or disciplinary powers, and it is so stated in the

ordinance. Yet, Point I of its brief, however, is devoted to this proposition: "The ordinance is a reasonable regulation for the government and discipline of the police bureau enacted by the City Council which has the authority to enact it and compel obedience by reasonable means."

The Board overlooks the fact that although its membership consists of nine highly respected members of the community, when it makes a public statement it does not speak for them as individuals, but with the authority of an official body of the City of Rochester, N. Y. Its public criticism of a police officer bears the imprimatur of the City of Rochester, N. Y.

This constitutes a reprimand which is defined in Webster's New International Dictionary, 2nd Edition, Unabridged as: "a severe or formal reproof, a censure, esp. one given with authority".

> §387 provides: "If the accused person is found guilty of the charge against him, the Commissioner may punish him by *reprimand,* by forfeiture of pay for some definite time, by a fine not exceeding fifty dollars, by a reduction in grade, or by dismisasl from the force, or may subject him to any other discipline prescribed in the rules promulgated by the Commissioner of Public Safety." (Emphasis supplied).

The Board seeks to do that which can be done only by the Commissioner, after a hearing and a finding of guilt against a police officer:

> "Investigations should not be conducted so that harmful publicity is used in lieu of the sanctions provided by law." (*Excelsior Exterminating & Chemical Co. v. Simon;* 23 Misc 2d 1090, 204 NYS 2d 197, 199).

An exhibit submitted by the Board (G-7) is a letter addressed to plaintiff George A. Signor which concludes with this paragraph:

> "Although the evidence adduced is inconclusive, it is of such a character that it cannot be ignored. Therefore, the Board has voted to accept the recommendation of the City Administration that this complaint, it's investigation, and findings, be made a part of your official personnel files."

It would seem that this violates the police officer's rights under § 387 as it could very likely have an effect upon his service record rating in determining his merit and fitness for promotion as provided under Article 5, § 6 of the State Constitution.

The City urges that the creation of the Board is an additional agency, working with others, in the area of human relations and that the procedures established by the ordinance protect the policeman, the principal beneficiaries of the ordinance, from unsubstantiated charges. On the contrary, the police officers say that they are seeking deliverance from their protector.

The joint report of the Public Safety and Law Committees of the City Council recommending the adoption of the enactments mentions the many problems facing Rochester and other American urban communities. All decent citizens should make their full contribution in the attempt to solve them. This court, however, cannot pass upon the philosophy of a police advisory board toward that end, but only upon its legality.

Memorandum Decision

In *People ex rel. Beck v. Graves,* 280 N.Y. 405, 410, the court held:

> " 'The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done.' (*Stuart v. Palmer,* 74 N.Y. 183, 188; *People ex rel. Bernard v. Wemple,* 117 N.Y. 77, 84; *Gilman v. Tucker,* 128 N.Y. 190, 200; *City of Rochester v. West,* 169 N.Y. 510; *Matter of Richardson,* 247 N.Y. 401, 421; *Rosalsky v. State of New York,* 254 N.Y. 117, 121.)"

Although this authority refers to possible consequences of a law, as to the test of its validity, upon the papers before the court it is clear that the functions of the Board have actually become intertwined with the operation of the Department of Public Safety, and particularly the Police Bureau, in violation of the rights of a police officer against whom a complaint was filed.

In *People v. Cook,* 197 App. Div. 155, 162, Affd. 236 N.Y. 505, there is this language:

> "It is a familiar principle that a statute may be unconstitutional in part and valid in part, if the parts which are void can be separated from those which are valid, (*Presser v. Illinois,* 116 U.S. 252; *People ex rel. Devery v. Coler,* 173 N.Y. 103.)"

One of the two concluding paragraphs of the joint report of the Council's Committees contains this pertinent paragraph:

> "In summary, the creation of a Police Advisory Board as proposed in the ordinance, allows complaints to be registered through a non-police agency

while allowing regular police procedures full opportunity to satisfy the complaint."

This expression of the Council's Committees can be given effect by applying the principle of severance in separating the functions of the Board, (*People v. Mancuso,* 255 N.Y. 463, 473) and exscinding the invalid parts of the ordinance. This requires the removal of its power to investigate and recommend action on a complaint as contained in § 10:10.2, the right to investigate as provided in § 10:10.4 and the elimination of §§ 10:10.17-10:10.24 incl. Its Rules of Practice and Procedure should be amended accordingly.

Any matter in the personnel files of a police officer emanating from the Board and not processed in accordance with § 387 of the Municipal Code is to be expunged.

The City's claim that the plaintiffs are estopped from attacking the constitutionality of an ordinance which has been in effect and operation since March 26, 1963, on the ground of laches, is without merit. "* * * [A] public body cannot acquire a non-existent power because resistance to exercise thereof is long delayed." *Board of Higher Ed. of City of New York v. Carter,* 213 N.Y.S. 2d 132, 26 Misc. 2d 989, modified 228 N.Y.S. 2d 704, 16 A.D. 2d 443, reversed in part 250 N.Y.S. 2d 33, 14 N.Y. 2d 138."

Under CPLR 3212(b): "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross motion."

Judgment in accordance with this memorandum decision.

Dated: December 30, 1965.

JACOB ARK
Justice Supreme Court

ORDER AND OPINION OF THE APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 8th day of January, 1968.

Present — Hon. Earle C. Bastow, Justice Presiding.
Hon. Harry D. Goldman,
Hon. Frederic T. Henry,
Hon. Frank Del Vecchio,
Hon. John S. Marsh, Associate Justices.

THE LOCUST CLUB OF ROCHESTER, et al.,

Respondents,

vs.

THE CITY OF ROCHESTER,

Appellant,

Henry Gillette, et al.,

Defendants.

The above named City of Rochester, one of the defendants in this action, having appealed to this Court from an order of the Supreme Court, entered in the office of the Clerk of the County of Monroe, on the 2nd day of February, 1966, and said appeal having been argued by Mrs. Ruth B. Rosenberg, of counsel for the appellant, and by Mr. Ronald J. Buttarazzi, of counsel for the respondents, and submitted by Mr. Benjamin Phelosof, of counsel for Amicus Curiae,

American Civil Liberties Union, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be, and the same hereby is unanimously reversed on the law and facts, without costs, and judgment is hereby entered as follows: ORDERED and ADJUDGED, That chapter 17 (formerly chapter 10) of the Rochester Municipal Code is valid and constitutional. All findings of fact contained in the Memorandum Decision of the Trial Justice, which are inconsistent with the Opinion herein, are hereby reversed and new findings are hereby made as contained in the Opinion herein, pursuant to CPLR § 5712 (c) 2.

Opinion by Bastow, J., which is hereby made a part hereof.

Enter.

LESTER A. FANNING

Entered: 11th day of January, 1968.

LESTER A. FANNING
Clerk.

OPINION OF THE APPELLATE DIVISION

SUPREME COURT
Appellate Division — Fourth Department

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THE LOCUST CLUB OF ROCHESTER, et al.,
Respondents,

vs.

THE CITY OF ROCHESTER,
Appellant,

Henry Gillette, et al.,
Defendants.

—

No. 460/1967

ARGUED: October 16, 1967
DECIDED: January 11, 1968

PRESENT:
HON. EARLE C. BASTOW, Justice Presiding.
HON. HARRY D. GOLDMAN,
HON. FREDERIC T. HENRY,
HON. FRANK DEL VECCHIO,
HON. JOHN S. MARSH, Associate Justices.

APPEAL by defendant City of Rochester from Order of Monroe Special Term, Ark, J., granting summary judgment to plaintiffs.

Order entered February 2, 1966.

APPEARANCES:

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Order and Opinion of the Appellate Division

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OPINION

BASTOW, J. P.

Plaintiffs brought this action seeking a declaration as to the validity, legality and constitutionality of an enactment of the Rochester City Council creating a Police Advisory Board. The order appealed from in substance stripped the Board of all the functions granted by the ordinance, except the right to receive and file complaints of the use of excessive or unnecessary force by members of the Rochester Police Bureau.

A proper understanding of the issues presented requires examination of the provisions of the ordinance. The Charter of the City of Rochester (§ 12-31, formerly § 521) authorizes the City Council to establish citizen advisory boards the members of which are appointed by the City Manager. In March, 1963 chapter 10 (now chapter 17) was added to the Code.[1]

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[1] The Code was adopted by the City Council on November 25, 1941. By Local Law No. 4 of 1965 it was re-codified and renumbered. The same law also renumbered the sections of the Charter. Both old and new section numbers will be given herein.

This chapter established a Police Advisory Board (Board) with jurisdiction to consider complaints against members of the police force which alleged "the use of excessive or unnecessary physicial force" by any such member (§ 17-3, formerly § 10-10.3). Its powers are limited to "those of an investigative and advisory nature, without any judicial or disciplinary powers" (§ 17-4, formerly § 10-10.4). After a written complaint has been made to the Board a copy is forwarded to the Chief of Police (§ 17-16, formerly § 10-10.16) who must within 10 days reply thereto with a writing containing his findings, recommendations, report of action taken and the evidence upon which the findings are based (§§ 17-18, 17-19, formerly §§ 10-10.18, 10-10.19). Upon receipt of the Chief's report the Board may make an independent investigation with the right to hold private closed hearings. Such must be held if demanded by the aggrieved party (§ 17-20, formerly § 10-10.20).

The enactment provides differing procedures in a proceeding where the Board agrees with the findings of the Chief of Police from those where the Board disagrees therewith (§§ 17-21 to 17-23, inc., formerly §§ 10-10.21 to 10-10.24). Where there is agreement the Board reports that fact to the Commissioner of Public Safety (Commissioner) and to the City Manager and so advises the Chief of Police and the complainant. If the complaint has received "public notice" the Board may "make public its agreement with the Chief's findings, recommendations and actions."

On the other hand, if the Board disagrees with the decision of the Chief of Police it must consult privately with him in an attempt to arrive at a common conclusion. The

Chief has the right to make a further investigation but if thereafter the disagreement continues the Board must so report to the Commissioner and the City Manager "along with its findings and all evidence on which the findings were based, and its recommendations." Finally, section 17-24 (formerly § 10-10.24) provides that if "action is satisfactory to the Board has not been taken by the city administration" within two weeks from the receipt by the Commissioner and the City Manager of the Board's report of disagreement the latter at a public hearing "may make public its recommendations" to the two city officials.

In January, 1965 the Board adopted a set of rules which set forth in detail regulations for practice and procedure. Among other things, it is provided that the police officer against whom a complaint has been filed is permitted to file a written verified answer to the complaint and to appear in person and by counsel. The hearing is to be private and witnesses are excluded except when giving testimony. These rules were adopted following the receipt of a written opinion from the Corporation Counsel, which advised the Board, among other things, that the respondent police officer had the privilege of asserting his constitutional rights to refuse to appear and if he appeared to assert his privilege against self-incrimination.

Pertinent to the issues presented are the provisions of § 8-34 (formerly § 387) of the City Charter. This is the familiar enactment placing in the Commissioner of Public Safety, authority to investigate a written verified charge made against a police officer, direct a public hearing thereon before himself or his designee and upon a finding of guilt to impose a penalty, among others, of a reprimand.

Special Term in substance concluded (48 Misc 2d 763) that § 17-24 (formerly § 10-10.24) authorizing the Board to

make public its recommendations to the Commissioner and the City Manager in a proceeding where action satisfactory to the Board had not been taken by the city administration fatally invaded the Charter provision authorizing the Commissioner to impose discliplinary penalty in the nature of a reprimand. It was held (p. 770) "that the functions of the Board have actually become intertwined with the operation of the Department of Public Safety, and particularly the Police Bureau, in violation of the rights of a police officer against whom a complaint was filed."

We reach a contrary conclusion. The legislative grant of power to the City Council to establish citizen advisory boards (Charter § 12-31, formerly § 521) was valid. (N.Y. Const. Art. 9, § 2 (c); Municipal Home Rule Law, § 10(1) (i).) In considering the provisions of the Charter (§ 8-34, formerly § 387) vesting in the Commissioner power to discipline police officers and those of Chapter 17 (formerly chapter 10) of the Code creating a Police Advisory Board it must be recognized that when some function "can be fair construction be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject" (Woods v. Supervisors, etc., 136 N.Y. 403, 409).

A committee of the Council in recommending adoption of Chapter 10 (now Chapter 17) of the Code wrote in part as follows: "The creation of a Police Advisory Board simply takes cognizance of a feeling, whether warranted or not, among many responsible citizens that adequate channels for communicating grievances involving police action do not exist. Those with public responsibility cannot ignore this feeling. * * * The board will provide a ready and simple outlet for the expression of grievances alleging exces-

sive use of force by police for those of our citizens to whom traditional legal routes of redress are remote or unknown * * * In summary, the creation of a (board) as proposed in this ordinance, allows complaints to be registered through a non-police agency while allowing regular police procedures full opportunity to satisfy the complainant."

Taking a closer look at the crucial section (§ 17-24, formerly § 10-10.24) — where there is disagreement between the Board and the two city officials — the extent of the power of the Board is to make public its "recommendation". In the absence of any disciplinary power vested in the Board it is difficult to imagine a "recommendation" that could exceed one that upon the facts presented some affirmative action should be taken by the city administration. The result would be a plain difference of opinion between city officials and the Board.

We do not share the concern of respondents that thereby some stigma would attach to the officer in question. Neither do we share the view of Special Term that the publicizing of the Board's recommendation would constitute a reprimand that only the Commisisoner may impose.

Special Term to support its view cited an activity of the Board relating to plaintiff, Signor (48 Misc 2d at page 769) and suggested that the action of the Board constituted a violation of the officer's rights under § 387 (now § 8-34) of the Charter. A reading of the quoted portion of the communication of the Board and the background material in the record demonstrates that therein the Board simply voted "to accept the recommendation of the City administration" that the material become part of the officer's personnel files. If this was error (in the absence of filing formal charges before the Commissioner) the error was one of the

city administration and not of the Board. If the officer had been wronged he presumably was entitled to legal redress to clear his personnel file.

We conclude, that fairly construed, the ordinance in no way diminishes, dilutes or infringes upon the statutory power vested in the Commissioner to fix and impose punishment for misconduct or dereliction of duty by a police officer. The limited right granted to the Board to make public its findings, in a proceeding where there is disagreement between it and the responsible city officials, would not constitute a "reprimand" within the meaning of the statutory provision vesting in the Commisisoner the right to impose such a penalty. At most such publication might result in direct or implied criticism of the police officer but it is difficult to conclude that such criticism would infect the official record of the officer if the responsible city officials (Chief of Police, City Manager and Commissioner) had concluded that there was no merit to the complaint pending before the Board.

In any event, we are here construing the provisions of an ordinance and the spirit and purpose of the enactment and the objectives sought to be accomplished by the City Council must be borne in mind. (Cf. Matter of New York Post v. Leibowitz, 2 N Y 2d 677, 685.) That legislative body was attempting to strike a balance between the rights of the police officer and the rights of the citizen. To quote again from the report recommending adoption of the ordinance: "The board should contribute to rather than impair, the efficiency of police performance of allowing grievances, some real, some imagined, to be considered by a responsible body of citizens, rather than remain, as they often do, smoldering

embers of mistrust and contention between police and citizens."

If the most grievous thing that could happen to a police officer by publication of the recommendations of the Board would be criticism, direct or implied, we conclude that this would not be sufficient reason to strike down the ordinance. Policemen, like judges are forced to make unpopular decisions and it has been written that "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." (Craig v. Harney, 331, U.S. 367, 376). "In a democratic society, one who assumes to act for the citizens in an executive, legislative or judicial capacity must expect that his official acts will be commented upon and criticized" (Goldberg and Douglas, JJ. concurring in New York Times Co. v. Sullivan, 376 U.S. 254, 299, 84 S. Ct. 710, 736).

We have examined the other contentions advanced by respondents and find them to be without merit. The order should be reversed and judgment entered declaring chapter 17 (formerly chapter 10) of the Code valid and constitutional.

Goldman, Henry, DelVecchio and Marsh, JJ., concur.

OPINIONS OF THE COURT OF APPEALS

Court of Appeals of New York
June 14, 1968

THE LOCUST CLUB OF ROCHESTER, JOHN HUNT, BENNIE JASKOT, GEORGE SIGNOR, RICHARD STERLING, ANTHONY D'ANGELO, NELSON EVANS and JOSEPH FAVATA, all having offices or residing in the City of Rochester, County of Monroe and State of New York,

Appellants,

vs.

THE CITY OF ROCHESTER, HENRY GILLETTE, FRANK LAMB, RAYMOND LILL, WILLIAM MALOY, JR., WILLIAM J. MALLEY, MARIO PIRRELLO, WILLIAM LEGG, PETER BARRY and HYMAN FREEMAN, as Members of the Common Council of the City of Rochester; THE POLICE ADVISORY BOARD and DR. KENNETH W. WOODWARD, RABBI HERBERT BRONSTEIN, DR. WILLSON H. COATES, EDGAR S. LAMBERT; JAMES S. MALLEY, THE REV. DONALD J. MULCAHY, THE REV. JAMES A. ROCKWELL, ANTHONY R. SCHNEIDER and ROSS GUGLIELMINO, as Members of the Police Advisory Board, all having offices or residing in the County of Monroe and the State of New York,

Respondents.

PER CURIAM.

Order affirmed, without costs, on the opinion at the Appellate Division.

FULD, C. J., and BURKE, BERGAN, KEATING, BREITEL and JASEN, JJ., concur.

SCILEPPI, J., dissents and votes to reverse in the following opinion.

SCILEPPI, Judge (dissenting).

This action was commenced by the Locust Club of Rochester, a police organization composed of individual policemen employed by the Rochester Police Bureau, to test the legality and constitutionality of a municipal ordinance enacted by the Council of the City of Rochester establishing a Police Advisory Board. I do not reach the constitutional questions presented by the appellants since it is my opinion that the ordinance in question is in direct conflict with section 351 and section 387 of the Charter of the City of Rochester and it is, therefore, invalid.

Section 351 of the Rochester City Charter provides: "The commissioner of public safety * * * shall hear and decide all charges of misconduct and incompetence made against any officer or member of the police and fire forces or of any bureau or division within his jurisdiction, and in all such cases shall have the power to issue subpoenas and administer oaths * * *. He shall have exclusive control of the administration of the police force" (emphasis added).

Section 387 of the charter implements the above-quoted provisions of section 351. It provides: "CHARGES AND

TRIALS OF POLICEMEN AND FIREMEN. If a charge be made by any person against any officer or member of the police or fire force, that he has been guilty of neglect of duty, or negligent or derelict in the performance thereof, or guilty of misconduct in his office, or that he is incompetent to perform the duties thereof, or that he is incapacitated by age or disease or infirmity to properly discharge the duties thereof, or that he is guilty of some delinquency or misconduct showing an unfitness for office or that he has violated the rules of the commissioner of public safety, the charge must be in writing, signed and verified by the person bringing the charge, and must set forth the specific act or acts that are the subject matter of the charge, and must contain such other information required by the rules of the Commissioner of Public Safety. After the filing of the charges, the Commissioner shall cause a preliminary investigation of the charges to be made, and if he finds that there is probable cause for such charges he may order a hearing on said charges. A copy of the charges must be given to the accused person. The hearing may be held by the Commissioner or by a person or persons designated by him who, in the opinion of the Commissioner, is qualified to hold hearings by virtue of his education, experience or training. If the holding of the hearing has been delegated, the hearing officer or officers shall hear the charges in accordance with the rules of the Commissioner and shall report to the Commissioner for his review and decision. The accused person has the right to be heard in person and by counsel, and to give and furnish evidence in his defense. All trials are open to the public. The Commissioner has power to issue subpoenas under his name and official title

to compel the attendance of witnesses upon any hearing, and any person duly served with a subpoena is bound to attend in obedience to the command thereof. If the accused person is found guilty of the charge against him, the Commissioner may punish him by reprimand, by forfeiture of pay for some definite time, by a fine not exceeding fifty dollars, by a reduction in grade, or by dismissal from the force, or may subject him to any other discipline prescribed in the rules promulgated by the Commissioner of Public Safety. The Commissioner may summarily dismiss from the force any person failing or neglecting to pay within the time or times prescribed by the Commissioner, a fine imposed by him. The decision of the Commissioner is final and conclusive, subject only to review by a court of competent jurisdiction'' (emphasis added).

If this Police Advisory Board were truly advisory in nature and function, I would have no quarrel with it, for section 521 of the Rochester City Charter authorizes the City Manager to appoint civilian advisory boards. An analysis of the authority and functions of the Police Advisory Board, however, demonstrates that it substantially interferes with the internal administration of the Rochester Police Bureau.

Section 10-10.16 of the Code of the City of Rochester authorizes the board to forward any complaint which charges a police officer with the use of excessive force to the Chief of Police. The Chief of Police must investigate the complaint and he must report his findings to the board within 10 days of receipt of the complaint (Code of the City of Rochester, Sec. 10-10.18). I fail to see how it can be said that the Commissioner of Public Safety has exclusive jurisdiction over the administrative affairs of his department

when a civilian advisory board can command the Chief of Police to conduct a preliminary investigation and report his findings to the board.

After the Chief of Police reports back to the board, the board is authorized to conduct further investigation and to hold private closed hearings (Code of City of Rochester, Sec. 10-10.20). Section 387 of the Rochester Charter authorizes only the Commissioner of Public Safety or his designate to hold hearings. It also provides that such hearings shall be open to the public.

Under the ordinance, if the board disagrees with the Police Chief's findings, recommendations and actions, it shall consult privately with him in an attempt to arrive at a common conclusion. If the board exists merely to receive complaints and to advise the Commissioner of Public Safety, it is impossible to justify any attempt to arrive at common conclusions where disagreements exist between the board and chief.

To aggravate matters, if the board and the chief cannot arrive at a common conclusion, the board is authorized to report this disagreement to the Commissioner of Public Safety and the City Manager (Rochester City Code, Sec. 10-10.23). If the city administration does not take action which is satisfactory to the board within two weeks of the receipt of the report of disagreement, the board may publicize its disagreement and its recommendations (Rochester City Code, Sec. 10-10.24). In fact and in effect, this is far from mere advisory action.

If the board were truly advisory, it would merely present its recommendations to the Commissioner of Public Safety who would then have the right to accept or reject them. Its

role would extend no further than this. Here, however, if the board is not satisfied with the Commissioner's actions, it is authorized to become his adversary and to resort to the forum of public opinion in an attempt to impose its view on the commissioner. Not only is this contrary to the concept of an advisory board, but it is an unwarranted and invalid intrusion upon the exclusive jurisdiction of the Commissioner of Public Safety to administer the internal affairs of his department.

Accordingly, I would reverse the order of the Appellate Division and reinstate the order of the Supreme Court, Monroe County.

Order affirmed, etc.

APPENDIX B
CODE OF THE CITY OF ROCHESTER
Volume I, Chapter 17

Code of the City of Rochester, Volume I, Chapter 17 provides as follows:

§ 17-1. Appointment to Board.

The Police Advisory Board will be a nine (9) member board appointed by the City Manager pursuant to § 12-31 of the Charter of the City of Rochester for three (3) year overlapping terms. Of the members first appointed, three (3) shall be for one (1) year terms, three (3) shall be for two (2) year terms, three (3) shall be for three (3) year terms; thereafter, all members shall be appointed for three (3) year terms. Residence within the City of Rochester is

not a requirement for Board membership. No active law enforcement officers may serve as Board members.

§ 17-2. Purpose of Board.

The purpose of this Board is to hear complaints of citizens against any member of the Rochester Police Bureau for alleged acts which fall within the Board's jurisdiction, to investigate these complaints, and to recommend such action as the Board thinks appropriate on each complaint.

§ 17-3. Jurisdiction of Board.

The jurisdiction of the Board is limited to consideration of complaints against any member of the Rochester Police Bureau, which complaint alleges the use of excessive or unnecessary physical force by a member of the Rochester Police Bureau against a person or persons.

§ 17-4. Powers of Board.

The powers of this Board are limited to those of an investigative and advisory nature, without any judicial or disciplinary powers.

§ 17-5. Quorum.

In order for the Board to conduct Board affairs, a quorum of six (6) members will be required, and a vote of five (5) members present in person at any meeting will be required for Board action.

§ 17-6. Cooperation with Board.

All city officers and employees are hereby directed to cooperate with the Board in carrying out its duties.

§ 17-7. Meetings of Board.

All meetings of the Board will be conducted in executive session in accordance with the rules and regulations adopted by the Board not in conflict with the provisions of this ordinance, unless exceptions to this are provided within this ordinance. The conduct of Board business and of the Board staff will be conducted privately unless otherwise noted in this ordinance.

§ 17-8. Public meetings.

The Board may hold public meetings for the purpose of electing officers and adopting rules and regulations to govern its operations.

§ 17-9. Paid staff.

The Board will have the power to appoint a paid staff within the budgetary limitations of any appropriating ordinance adopted by the City Council from time to time for the operation of said Board.

§ 17-10. Effective date of jurisdiction.

The jurisdiction of this Board will commence as of the effective date of this ordinance. Any incident alleged to have happened prior to the date of the adoption of this ordinance shall not be within the jurisdiction of this Board.

§ 17-11. Complaints to be filed within ninety days.

All complaints must be in writing and signed by the person making the complaint. The complaint must be filed with the Board within ninety (90) days of the date of the

occurence complained about except in the case where the Board agrees to an extension of this time because of hardship. Hardship shall be in the nature of an incapacity to file a report with the Board, in which case the complaint must be filed within thirty (30) days after the termination of the incapacity to file.

§ 17-12. Filing of complaints.

The Board will receive complaints from any person who believes himself aggrieved, or from any other person on behalf of the aggrieved person who authorizes the filing of a complaint on his behalf. The term "person" when used in this ordinance, shall not include any corporation, association, organization, agency, or governmental unit. The term "aggrieved person" when used in this ordinance shall mean the actual individual who was personally and physically involved in the incident where there is alleged to have been the use of excessive or unnecessary force by a member or members of the Rochester Police Bureau. In the event of mental incompetency, infancy, or death of the aggrieved person, the Committee or legal representatives of the aggrieved person may file a complaint in the place of the aggrieved person, in which event the verification may be made upon information and belief, rather than personal knowledge by said Committee or legal representative.

§ 17-14. Forms used in making complaints.

The written complaint shall be on forms furnished by the Board. The complaint to be within the Board's jurisdiction, must set out in concise language the following information:

A. The name and address of the aggrieved person;

B. The date, the specific location, and the approximate time of day where and when the alleged incident occurred;

C. The number of persons involved in the incident, their names and addresses if known, or if not known, such other information as will assist the Board to identify all participants;

D. The specific injuries or damages sustained by the aggrieved person;

E. The names and addresses of any known witnesses to the incident;

F. Such other information that might assist the Board in making a complete investigation of the incident;

G. Such other information that the rules and regulations of the Board may require.

§ 17-14. Filing by aggrieved person.

If the aggrieved person files the complaint, the complaint must be signed and verified by the aggrieved individual.

§ 17-15. Filing on behalf of aggrieved person.

If the complaint is filed on behalf of the aggrieved person, the staff of the Board will be responsible for making every reasonable attempt to secure verification from the aggrieved individual.

§ 17-16. Copy to Chief of Police.

Whether the complaint is verified or not, an exact copy thereof shall be forwarded as soon as posible to the Chief of Police by the staff of the Board.

§ 17-17. No action required of complaint not signed and verified.

If the complaint is not signed and verified by the aggrieved person within ten (10) days of its original filing with the Board, no further action shall be required in the way of a report from the Chief of Police to the Board, and the Board shall take no further action thereon.

§ 17-18. Chief of Police to report within ten days.

If the complaint is signed and verified by the aggrieved person and deals with a subject matter that is within the jurisdiction of the Board, the Chief of Police must report his findings on the complaint to the Board within ten (10) days of receipt of the verified complaint from the Board. If the Chief of Police is unable to complete his investigation within that period of time, the Chief of Police shall file an interim progress report. In any event, the Chief must file with the Board a final report within a reasonable period of time.

§ 17-19. Chief of Police's report.

The Chief of Police's report to the Board shall contain all evidence on which he has based his findings. The Chief's report shall contain his findings, his recommendations, and report of action taken, if any.

§ 17-20. Independent investigation by Board.

Upon receipt of the Chief's report, the Board, with the assistance of the staff shall make any independent investigation it considers necessary, including the right to take statements from witnesses and the right to hold private, closed hearings. The Board must hold a private, closed hearing if the aggrieved person makes a written request for such a hearing at the time of or after the filing of a signed and verified complaint in accordance with the provisions of this ordinance.

§ 17-21. Evaluation of Chief of Police's report.

The Board shall then proceed to evaluate the Chief of Police's report. If the Board finds that it agrees with the Chief's findings, recommendations, and actions, the Board shall report this to the Commissioner of Public Safety and to the City Manager and shall so advise the complainant and the Chief of Police. If the complaint has received public notice, the Board may, in addition, make public its agreement with the Chief's findings, recommendations, and actions. If the Board finds that it disagrees with the Chief's decision after evaluation of his report, it shall consult privately with the Chief of Police in an attempt to arrive at a common conclusion. In so doing, the Board must make available to the Chief of Police all information and evidence it has in its possession concerning the complaint. Following consultation between the Chief of Police and the Board, the Chief of Police shall have the opportunity to conduct further investigations to properly evaluate any new information or evidence presented to him by the Board. The Chief of Police shall promptly report the results of his findings to the Board.

§ 17-22. Board report when concurring with Chief of Police.

If the Board and the Chief of Police arrive at a common conclusion, the Board will report this fact along with findings and agreement to the Commissioner of Public Safety and to the City Manager and will so advise the complainant and the Chief of Police. If the complainant had received public notice, the Board may, in addition, make public its agreement with the Chief's findings, recommendations and actions.

§ 17-23. Board report when in disagreement with Chief of Police.

If the Board and the Chief of Police are unable to arrive at a common conclusion, the Board shall report this disagreement along with its findings and all evidence on which the findings were based, and its recommendations to the Commissioner of Public Safety and the City Manager.

§ 17-24. Public announcement of recommendations.

If within two (2) weeks of the receipt of the report of disagreement from the Board to the Commissioner of Public Safety, and the City Manager, action which is satisfactory to the Board has not been taken by the city administration, the Board may make public its recommendation to the Commissioner of Public Safety and the City Manager. This act may be done at the public meeting of the Board.

§ 17-25. Keeping of records, quarterly reports.

The Board shall keep a record of all complaints and disposition thereof. The Board shall file a quarterly report with the City Manager showing the general activity of the Board. This report is to be made public.

APPENDIX B
RULES OF PRACTICE AND PROCEDURE

City of Rochester, N.Y.
Police Advisory Board
34 State Street
Rochester, N.Y. 14614

Dr. Kenneth W. Woodward, Chairman

Rabbi Herbert Bronstein
Dr. Willson H. Coates
Edgar S. Lambert
James S. Malley
The Rev. Donald J. Mulcahy
The Rev. James A. Rockwell
Anthony R. Schneider

Ross Guglielmino, Executive Director and Legal Counsel

RULES OF PRACTICE AND PROCEDURE

By virtue of the authority vested in it by CH. 10-10.1 to CH. 10-10.25 of Volume II of the Municipal Code, the Board adopted the following Rules of Practice and Procedure on *January 25, 1965.*

PART I. DEFINITIONS.

The terms used in these rules shall have the meaning defined unless other meaning is clearly apparent in language or context:

a. *Aggrieved person,* is the individual who was personally and physically injured or killed in the incident where it is alleged unnecessary or excessive force was used.

b. *Complainant,* is the person who files the complaint before the Board.

c. *Respondent,* is the member of the Rochester Police Bureau against whom a complaint has been filed before the Board.

d. *Board,* is the Police Advisory Board of the City of Rochester.

e. *Quorum,* for the conduct of Board affairs shall consist of the presence in person of six members at any meeting thereof, and the vote of five members present shall be required for Board action; however, the presence of five members in person, with all of them concurring, shall be sufficient to take action on any informal complaint.

f. *Party,* is either the complainant or respondent.

g. *The Ordinance,* shall mean the Municipal Ordinance of the City of Rochester, N. Y., establishing the Police Advisory Board, as amended, Vol. 11 of the Municipal Code, CH. 10-10.1 to CH. 10-10.25.

h. *Police Bureau,* is the City of Rochester Police Bureau.

i. *Hearing Panel* shall mean the three members of the Board designated by the Chairman to conduct a hearing and the legal counsel to the Board.

j. *Chief,* shall mean the Chief of Police of the City of Rochester Police Bureau.

k. *Formal Complaint* shall mean any complaint filed with the Board by an authorized person against a member of the Police Bureau alleging the use of excessive or unnecessary physical force. Should the complaint, in addition, allege other police misconduct, the Board's jurisdiction shall be limited solely to consideration of those portions of the com-

plaint alleging unnecessary or excessive physical force.

l. *Informal Complaint,* shall mean any complaint against a member of the Police Bureau filed with the Board which does not qualify as a formal complaint. The Board's jurisdiction in respect of informal complaints shall be limited to receiving the complaint, reducing it to writing, and mailing a copy thereof to the chief and to the City Manager.

m. *The Chief's Report* shall mean the complete investigation of the complaint, findings and supporting evidence, including interim progress report and all supplements thereto, prepared by the Chief for the Board.

PART II. FORMAL COMPLAINTS

Sec. 1. *WHO MAY FILE.*

a. Formal complaints against a member of the Rochester Police Bureau alleging the use of unnecessary or excessive physical force may be filed by any person who believes himself aggrieved or by any other person whom he authorizes. It may not be filed by a corporation, organization or governmental unit.

b. The Complaint of an infant, incompetent or deceased person may be filed in his behalf by his parent, person in *loco parentis,* guardian, committee or legal representative.

Appendix B — Rules of Practice and Procedure

Sec. 2. *FORM OF COMPLAINT*

The Complaint shall be in writing on forms furnished by the Board, and must be signed by the complainant. It shall contain the following information:

a. The name, age, address, phone number and place of employment of complainant; the name and address of his attorney, if any.

b. The name, age, address, phone number, occupation and place of employment of the aggrieved person.

c. The names, badge numbers, and addresses of the respondents, or if they are unknown, such information as will enable the Board to identify them.

d. The date, time and place where the injuries to the aggrieved person were sustained.

e. The specific injuries or damages sustained by the aggrieved person.

f. A statement with particularity of the incident resulting in the injuries.

g. The names and addresses of all known witnesses to the incident.

h. A statement of any outstanding criminal charges against the aggrieved person.

i. A statement of any other action, civil or criminal taken or contemplated by or on behalf of the aggrieved person, arising out of the same grievance alleged in the complaint and the present status of such action.

Sec. 3. *VERIFICATION OF COMPLAINT*

All complaints shall be verified before a person duly authorized by law to take oaths.

a. The complaint filed by the aggrieved person shall be verified by him.

b. The complaint filed on behalf of an aggrieved person shall be signed by the complainant, and thereafter shall be verified by the aggrieved person.

c. The complaint filed on behalf of an infant, incompetent or deceased person shall be verified by the complainant on information and belief.

Sec. 4. *PLACE AND TIME OF FILING*

a. A complaint shall be filed with the executive Director of the Board at the Board's office.

b. It shall be filed within 90 days of the occurrence out of which the complaint arose, unless the time is extended by the Board.

c. When the aggrieved person is prevented from timely filing of his complaint because of his incapacity, the Board may extend his time to file, but in no event beyond thirty days after termination of his incapacity.

Sec. 5. *WITHDRAWAL OF COMPLAINT*

A complaint may be withdrawn only with the consent of the Board.

Sec. 6. *EFFECT OF OTHER ACTIONS PENDING ORIGINATING FROM SAME GRIEVANCE.*

The pendency of other actions or proceedings either civil or criminal, originating from the same grievance which is the subject of the complaint before the Board shall have the following effects:

a. A criminal proceeding against the respondent, shall result in postponement of any decision by the Board until final determination of the criminal proceeding. It shall not, however, be a bar to full investigation of the complaint by the Chief and the Board. In such case, the complete file of the Board shall remain confidential and not be disclosed to either party.

b. A criminal proceeding against the aggrieved person shall have no effect, except that he may request in writing postponement of the decision of the Board until final determination of the criminal proceeding.

c. The filing of a Notice of Claim or the commencement of a civil action seeking damages against the City of Rochester started by the aggrieved person, or in his behalf, or the filing of a Notice of Claim or commencement of a civil action by any other aggrieved person whose claim arises out of the same grievance, shall result in postponement of the decision by the Board, until final determination of the action. In such case the complete file of the Board shall remain confidential and shall not be disclosed to either party.

d. A civil action seeking damages started by respondent shall have no effect.

PART III. HEARINGS

Sec. 1. *WHEN HELD*

A hearing on a complaint shall be held when ordered by the Board. It must be held when the aggrieved person makes a written request for one. Request for a hearing must be made in writing filed with the Board at its office at any time prior to final decision of the Board.

Sec. 2. *APPEARANCES*

The aggrieved person shall be present in person and may be represented by attorney. The respondent may appear in person and by counsel. If the aggrieved person or respondent cannot afford counsel of his own chosing, the Board will endeavor to obtain the services of a member of the Monroe County Bar Association to represent him without compensation.

Sec. 3. *HEARING PRIVATE*

The hearing shall be private and witnesses shall be excluded from the hearing room except when giving testimony. In addition to the Hearing Panel, the parties, their counsel and the hearing stenographer, the following shall be entitled to attend: all other members of the Board, the City Manager, the Corporation Counsel, the Commissioner of Public Safety, the Chief, or one authorized representative of each.

Sec. 4. *WHO SHALL CONDUCT*

Hearings shall be conducted by a Hearing Panel of three members of the Board designated by the Chairman who shall designate one of these as the presiding member. The Legal Counsel of the Board shall sit with the Hearing Panel.

Sec. 5. *PLACE*

Hearings shall be held at a time and place designated by the Board, having due regard to the convenience of the parties and witnesses.

Sec. 6. *NOTICE OF HEARING*

At least 15 days before the date of hearing, a notice of hearing stating the time and place of hearing, and a copy of the verified complaint and amendments thereto, shall be served on all the parties by certified mail, return receipt requested. The notice to the aggrieved person shall contain a statement that he must respond to the notice not less than 5 days prior to the hearing date, indicating his intention to be present at the hearing in person, and that failure so to respond will result in dismissal of the complaint, unless, upon timely response to the notice, for good cause shown, the Board grants him a postponement or rescheduling of the hearing.

A copy of the Notice of Hearing shall also be sent by ordinary mail to the City Manager, the Commissioner of Public Safety, the Corporation Counsel and the Chief.

Sec. 7. *ANSWER*

The respondent upon whom a notice of hearing and a copy of the complaint has been served, may file a written verified answer in person or by attorney within six days from the date of service of such notice of hearing.

Sec. 8. *PLACE AND MANNER OF FILING*

The answer must be filed in duplicate at the office of the Board. It may be filed by personal service or by certified

mail, return receipt requested. One copy of the answer shall be served by the Board, personally or by certified mail, return receipt requested, upon the complainant or his attorney.

Sec. 9 *FORM OF ANSWER*

The answer shall be in writing, and shall be verified by the respondent. It shall contain the post-office address of the respondent, the name and post-office address of his attorney, if he has one, a general or specific denial of each material allegation of the complaint controverted by the respondent, or a denial of any knowledge or information thereof sufficient to form a belief and a statement of any matter constituting a defense.

Sec. 10 *DISCLOSURE AND CONFIDENTIALITY OF BOARD'S FILES*

Except as prohibited elsewhere by these rules, the Board shall disclose to the parties the following:

a. The complaint and any amendments thereto.

b. The answer and any amendments thereto.

c. The aggrieved person's statement taken as part of the Chief's investigation.

d. The respondent's statement taken as part of the chief's investigation.

No other parts of the Boards files shall be disclosed to the parties.

Sec. 11. *HEARING PROCEDURE*

a. The Hearing Panel shall not be bound by the strict rules of evidence prevailing in courts of law or equity and

may receive such evidence as seems to them equitable and proper.

b. The proceedings shall be conducted by the presiding member, but the other members shall have the right to ask questions and seek information individually.

c. The Legal Counsel to the Board shall sit to the left of the presiding member. He shall rule on all questions of procedure and the admissibility of evidence.

d. All oral testimony shall be given under oath or affirmation.

e. A stenographic record of the proceeding shall be made and kept. It shall first show the time and place of the hearing, the names of the Hearing Panel, its presiding member, and other members of the Board who are present, the Board Counsel, the parties and their attorneys.

f. The aggrieved person or his attorney shall then present his case, call his witnesses, and present his proof, then submit to cross examination by respondent or his Counsel and by members of the Hearing Panel.

g. The respondent or his Counsel shall then present his defense, call witnesses and present his proofs and then similarly submit to cross examination and questions by the Hearing Panel.

h. Exhibits offered by either party may be received by the Board.

i. All proofs shall be taken in the presence of the parties and their counsel, but the hearing may proceed in the absence of either party, if by his own fault, after due

notice, he fails to be present or fails to obtain an adjournment for a valid reason.

j. If the Hearing Panel deems it necessary to make any inspections or obtain proofs or make any inquiries outside of the hearing, the parties may authorize that the Hearing Panel make such inspection or inquiries or obtain such proofs in the absence of parties.

Sec. 12. *WRITTEN TRANSCRIPT OF THE RECORD*

The written transcript of the record upon the hearing before the panel shall consist of the verified complaint, the notice of hearing, the verified answer, and any amendment thereto, the stenographic transcript of the testimony taken at the hearing, the exhibits and depositions in evidence.

Sec. 13. *DECISION OF THE BOARD AFTER A HEARING*

The decision of the Board shall be made by a vote of five members present in person at a meeting of the Board in which a quorum is present. It shall be made after a review of the written transcript of the record of hearing, the chief's report, interim report and supplemental reports, his findings, recommendations and action.

The Board shall exclude from its deliberations all statements of witnesses not made under oath, other than the statements of the parties themselves, and official reports of the incident involved in the complaint.

The Board's decision shall be in the form of a written opinion containing the reasons therefor.

EXHIBIT B
CODE OF THE CITY OF ROCHESTER
Volume I, Section 8-34

Code of the City of Rochester, Volume I, Section 8-34, provides as follows:

Charges and trials of policemen and firemen.

If a charge be made by any person against any officer or member of the Police or Fire Force, that he has been guilty of neglect of duty, or negligent or derelict in the performance thereof, or guilty of misconduct in his office, or that he is incompetent to perform the duties thereof, or that he is incapacitated by age or disease or infirmity to properly discharge the duties thereof, or that he is guilty of some delinquency or misconduct showing an unfitness for office, or that he has violated the rules of the Commissioner of Public Safety, the charge must be put in writing signed and verified by the person bringing the charge, and must set forth the specific act or acts that are the subject matter of the charge, and must contain such other information required by the rules of the Commissioner of Public Safety. After the filing of the charges, the Commissioner shall cause a preliminary investigation of the charges to be made, and if he finds that there is probable cause for such charges he may order a hearing on said charges. A copy of the charges must be given to the accused person. The hearing may be held by the Commissioner or by a person or persons designated by him who, in the opinion of the Commissioner, is qualified to hold hearings by virtue of his education, experience, or training. If the holding of the hearing has been delegated, the hearing officer or officers shall hear the charges in accordance with the rules of the Commissioner and shall report to the Commissioner for his review and decision. The accused person has the right to

be heard in person and by council, and to give and furnish evidence in his defense. All trials are open to the public. The Commissioner has power to issue subpoenas under his name and official title to compel the attendance of witnesses upon any hearing, and any person duly served with a subpoena is bound to attend in obedience to the command thereof. If the accused person is found guilty of the charge against him, the Commissioner may punish him by reprimand, by forfeiture of pay for some definite time, by a fine not exceeding fifty dollars ($50.) by a reduction in grade, or by dismissal from the force, or may subject him to any other discipline prescribed in the rules promulgated by the Commissioner of Public Safety. The Commissioner may summarily dismiss from the force any person failing or neglecting to pay within the time or times prescribed by the Commissioner, a fine imposed by him. The decision of the Commissioner is final and conclusive, subject only to review by a court of competent jurisdiction.

EXHIBIT C
SUPREME COURT OF MONROE COUNTY ORDER, DATED NOVEMBER 8, 1968

STATE OF NEW YORK — SUPREME COURT
County of Monroe

THE LOCUST CLUB OF ROCHESTER, JOHN HUNT, BENNIE JASKOT, GEORGE SIGNOR, RICHARD STERLING, ANTHONY D'ANGELO, NELSON EVANS and JOSEPH FAVATA, all having offices or residing in the City of Rochester, County of Monroe and State of New York,

Appellants,

vs.

THE CITY OF ROCHESTER, HENRY GILLETTE, FRANK LAMB, RAYMOND LILL, WILLIAM MALOY, JR., WILLIAM J. MALLEY, MARIO PIRRELLO, WILLIAM LEGG, PETER BARRY and HYMAN FREEMAN, as Members of the Common Council of the City of Rochester; THE POLICE ADVISORY BOARD and DR. KENNETH W. WOODWARD, RABBI HERBERT BRONSTEIN, DR. WILLSON H. COATES, EDGAR S. LAMBERT, JAMES S. MALLEY, THE REV. DONALD J. MULCAHY, THE REV. JAMES A. ROCKWELL, ANTHONY R. SCHNEIDER and ROSS GUGLIELMINO, as Members of the Police Advisory Board, all having offices or residing in the County of Monroe and the State of New York,

Respondents.

INDEX NO. 2633/65

A motion for reargument and to amend the remittitur in the aboye case having heretofore been made upon the

part of the Plaintiffs-Appellants herein, and the papers having been submitted thereon and due deliberation having been thereupon had and the Court of Appeals having ruled denying the motion and amending the remittitur as per the annexed Order of the Court of Appeals dated September 26, 1968, it is

ORDERED that the said Order of the Court of Appeals denying said motion for reargument and amending the said remittitur be and hereby is made and accepted as the Order of this Court.

November 8, 1968

/s/ DANIEL E. MACKEN

ORDER DATED SEPTEMBER 26, 1968

STATE OF NEW YORK — COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-sixth day of September A. D. 1968.

PRESENT, Hon. Stanley H. Fuld, *Chief Judge, presiding.*

4 Mo. No. 740

The Locust Club of Rochester, et al.,

Appellants,

vs.

The City of Rochester,

Respondents.

A motion for reargument and to amend the remittitur in the above cause having heretofore been made upon the

part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Plaintiffs argued that the ordinance creating the Police Advisory Board violated due process requirements in that the standards or norms of action were indefinite and vague; denied equal protection under the law to police officers; permitted Bills of Attainder contrary to Article I of the Constitution; and violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution. This court held that plaintiffs' constitutional rights were not violated.

AND the Supreme Court of Monroe County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

/s/ GERRON KIMBALL
Deputy Clerk